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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

AMERICAN PUMICE COMPANY,

Appellee.

Appeal From the United States District Court for the Central District of California.

APPELLEE'S BRIEF.

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Statement.

The issue on appeal relates to the value of two groups of pumice mines. Fee title to the real property always was and remains in the United States. The only interest being condemned was the right to possess and mine the claims. Just compensation would be measured by the combined value of the locator's rights, or of their successors, and of the lessees' interest under the leases and options. The one group known as the Donna-Gill claims is approximately 50 miles from the other group known as the Brown Group claims. The first-named group were operated as open pit mines, whereas

the second-named group were worked mainly as underground operations. Portable equipment was used to conveniently produce from mines in each group. The time of production was based in part on demand for a particular type of pumice and in part on the weather. Both open pit and underground mining was simple and economic [Tr. 142; Def. Exs. BA. and BB.].

Appellee's Contention.

1. There were no sales of comparable properties.

2. Where there are no comparable sales, the District Court quite properly considered a second recognized approach to valuation, namely the capitalization of income approach.

3. Appellant's valuation testimony had no probative value, the District Court's findings on value are well within the valuations testified to by Appellee's witnesses and the judgment should be affirmed.

ARGUMENT.

1. The Valuation Problem Before the District Court Was to Determine the Fair Market Value of the Right to Extract Pumice From Certain Unpatented Mining Claims.

The value would of necessity be determined from what an informed prospective, willing buyer would pay an informed prospective, willing seller of these rights. The claims were in wild, barren desert used for a missile range, and not suitable for any surface, private users, nor legally available for any such uses. A sale of such rights in order to be comparable and capable of shedding some light on the value of the rights under consideration herein, would necessarily need to be within an area which is not too far distant from the principal market for such pumice as to make it competitive with subject properties. Appellee's witness Frederick testified that the subject claims were of special pumice character and rare; that pumice deposits in a different district and the price of sale of them would have no bearing on a comparison with subject properties [Tr. 1184]. He further testified that the transactions (after the American Pumice Company was excluded) between Splane and others were of no value and were not open market comparable sales of clear title to any of the claims [Tr. 1185-1193].

Appellee's witness King testified that the subject claims had an advantage (a freight umbrella) as competition is involved with another 100 miles or more of hauling and to far away to compete; that there are no comparable mining claims [Tr. 867-871].

In this respect, Appellant's witness Schuette on cross-examination admitted that hauling costs from pumice mines in Mono County which he investigated were considerably more per ton mile to the Los Angeles area market [Tr. 1746].

Appellant's first witness Schuette "browsed" around the Brown group of subject claims one day and around the Donna-Gill claims one day also [Tr. 1748-1754]. He offered no testimony as to comparable sales.

Appellant's witness Jones testified that the Mono County mines he investigated had no aggregate or accoustical pumice—only block pumice—and that costs to haul from the Bishop-Laws area pumice deposits he investigated, would be 40 to 50 cents per ton mile more for the additional 130 miles; and railroad would be considerably more. He was uninformed as to the necessary drying cost in Bishop-Laws area [Tr. 1864-1865].

Jones discussed in vague terms a sale in Sonoma County in 1938, "about 35 miles north of Bishop, I guess," [Tr. 1764]. No other details of the purported sale were offered. The same witness testified to discussions with persons who had bought and sold pumice claims in Sonoma County but did not testify to details thereof. No specific sales were offered [Tr. 1765]. He also testified to discussions with a party who had sold some unspecified pumice claims back in 1926. No specific transactions were described [Tr. 1765]. Over and above this, the location and existence of the so-called comparable sales was not shown. He could not

determine from the location notices either the County or the Township or Section where such properties were located [Tr. 1787-1793]. There was a total absence of any testimony as to quantity or quality of pumice on the locations mentioned.

Jones further testified that he discussed a sale of two mill sites, some personal property, and the invalid Donna No. 5 claim. This obviously did not qualify as a comparable sale, so no further testimony was permitted over objection on the subject by the District Court [Tr. 1765-1771]. This witness finally testified that he searched for comparable sales in the subject area but "couldn't find anybody that knew anything about them and couldn't find out any facts." [Tr. 1794-1795].

Thus, from the testimony of Appellant's witnesses, there appeared and it was established that there were no comparable sales.

There was no valid testimony of comparable sales presented to the District Court during the trial. Appellant argues (pp. 15, 16 of Brief) that these inadequacies in the foundational establishment of the alleged sales were merely factors going to the weight of the evidence and could have been fully developed by Appellee on cross-examination. The fact that any sale took place, was not shown to the court; and in any event Appellee cannot be called upon to supply deficiencies in meeting foundational requirements which are the responsibility of Appellant's witnesses.

2. There Are Three Recognized Approaches to the Valuation of Real Property or Interests in Real Property.

There are three recognized approaches to the valuation of real property or interests in real property, namely;

(a) The market data or comparable sales approach;

(b) The summation approach, *i.e.* replacement cost new of improvements, less depreciation, plus the value of the unimproved land as indicated by comparable sales of vacant land; and

(c) The income or capitalization approach.

United States v. Sowards, (C.A. 10, 1966) 370 F. 2d 87.

It generally is believed that current sales at arms' length of similar property are the best evidence of market value. Sometimes there is a clear market, as in the case of sub-division lots being offered and sold at a fixed price. In other cases, however, there may be no market that can be shown either by recent prior sales of the property taken, or comparable property in the vicinity upon which value may be predicated. In such cases, it is necessary to resort to other data to estimate its value including, where appropriate, the capitalization of estimated future income or reproduction cost less depreciation. *United States v. Toronto Nav. Co.,* (1949) 338 U.S. 396, 402; *Kimball Laundry Co. v. United States,* (1949) 388 U.S. 1; *Kinter v. United States,* 156 F. 2d 517 (C.A. 3, 1946); *United States v. General Motors,* (1945) 323 U.S. 373; *United States v. Petty Motor Co.,* (1946) 327 U.S. 372; and *United*

States v. Causby, (1946) 328 U.S. 256. In *United States v. Sowards,* (C.A. 10, 1966) 370 F, 2d 87, the court took the position that determination of market value is not limited to evidence of sales of comparable properties a reasonable time before taking. The Court stated:

> "Recognizing difficulties of establishing market value where there are no comparable sales, the Supreme Court in *U.S. vs. Miller.* 317 U.S. 369, 63 S.Ct. 276, 87 LEd. 336, at 374 and 375 stated:
>
> > 'Where for any reason the property has no market resort must be had to other data to ascertain its value— .Where the property taken, and that in its vicinity has not in fact been sold within recent times, or in significant amounts, the application of the concept involves at best, a guess by informed persons.'
>
> as we stated in *Sill Corp. vs. U.S. 10 Cir.,* 343 Fed. 2d, 411, 416, cert. denied 382 U.S. 840, 86 S.Ct. 88, 15 L.Ed. 2d 81:
>
> > 'We know of course, that the law is not wedded to any particular formula or method for determining fair market value as the measure of just compensation. See: *U.S. vs. Miller,* 317 U.S. 369, 63 S.Ct. 276, 87 LEd. 336, and *U.S. vs. Sowards,* et al. (C.A. 10) 339 Fed. 2d 401. It may be based upon comparable sales, reproduction costs, capitalization of net income, or an interaction of these determinants.' "

In the instant case, inasmuch as there were no comparable sales, this approach was not useable. The summation approach is only adapted to improved real prop-

erty, therefore this method was not useable as the claims are unimproved.

The income or capitalization approach is particularly adaptable to the valuation of the pumice claims in this case by reason of the common-sense fact that buyers of such claims, or of leases to mine and sell the ore bodies therein, would be motivated solely by the prospective net income which would result from their mining operations. This value, common practice in the mining community shows, is determined by a consideration and processing of the various elements that relate to such mining operations.

Appellee's witness King testified that the theory he used to appraise these mining properties is used all over the world [Tr. 829, 909, 919]. Frederick testified for Appellee that in an evaluation of pumice in the ground, the only way to calculate a value of it is to determine what it might sell for, when you would sell it, and the rate at which you would sell it [Tr. 1153]. He further testified that it is common and recognized practice to use a 10% discount factor and the Markell formula (a straight discount method) to evaluate long life mines [Tr. 1195-1202]. Appellee's witness Schmidt testified to the capitalization method for evaluating mineral deposits. One which he devised[1], was referred to in a leading mining text book. See *Mine Examination & Valuation,* Baxter & Parks, 2d Edition, 1933, 1939. He used a 10% discount factor [Tr. 1249].

The indicated present value of the claims, *i.e.,* the present worth of the right to extract and sell the

[1]The Present Value of a Mine.

mineral, must be the result of intelligent consideration of these things:

(1) What is the quality and the quantity of the recoverable ore deposits?

(2) What would be required as a capital investment, to undertake mining—roads, plant, physical requirements?

(3) What would be the total cost per ton or per unit of product to extract the same and transport it to the point of delivery?

(4) What would be the gross selling price per ton F.O.B. point of delivery?

(5) What would be the amount in tons that could be expected to be produced and sold per year and for what period of time (useable economic life of claim)?

(6) What would the practice and custom in the industry require as a return; or, in other words, what capitalization or discount rate should be applied to the indicated net income stream to reduce it to the indicated present value of the future benefits?

As to each of the subject claims, all of the above considerations and elements were carefully determined, considered and processed by each of Appellee's witnesses, Frederick, King, and Schmidt.

Appellant's brief is laced with the misconception that the Appellee's witnesses and Judge Hall were hypothesizing a pumice mining processing, delivering and selling business, and with the further misconception that value was determined by the Judge by mathematically computing it by multiplying the quantity of pumice in the

ground by the going unit price. These misconceptions show up throughout the thirty one pages of its brief. Indeed, on Page 2, under the heading, "Questions Presented," Appellant asserts Question No. 1 to be: "Whether in this condemnation valuation case there is support in the facts or in the law for the District Court's award arrived at 'by constructing a hypothetical pumice, mining, processing and selling business, etc.'" Strangely another place in Appellant's Brief (p. 18) (in referring to Ray-Gill No. 31), it asserts: "But this was not an undeveloped claim. It had been worked by the American Pumice Company." Again, (at p. 19) the same claim is referred to by Appellant as a "known and developed deposit."

There is nothing hypothetical in the unrebutted fact that long before the date of taking, the subject properties were in operation, and were month in and month out, year in and year out, mining, processing, delivering to railroad pick-up sidings, and there disposing of by sale pumice of the several kinds produced from both the Brown Group of claims and the Donna-Gill Group of claims. Oral testimony and exhibits show the active mining processing and shipping methods in vogue at the date of value in these cases. Loading chutes, a sacking and bagging plant, drag line operation, stockpiles of pumice, equipment at rail siding, loadingcar methods were testified to by Appellee's witness Splane and illustrated in exhibits [Tr. 152, 160, 175, 176, 178 and 179; Def. Exs. AU, AV, AW, AY, BA, BB, BK, BL, BM, BN, BO, BQ, BS, BT and BY].

Appellee's witness Splane testified that pumice had been produced from Donna-Gill and Brown Groups claims from 1940 until the Navy took possession in

1944 and 1945 [Tr. 138-141]; that it was sold to U.S. Gypsum Company, Gladding McBean, and other manufacturers of accoustical plaster as well as for large buildings in the Los Angeles Metropolitan market, as far north as Salinas, south to San Diego and to Imperial Valley [Tr. 138-141]. He testified that 90% of light weight aggregate users in Southern California were being supplied by American Pumice Company; that 18 prominent buildings, including General Petroleum and Saks' 5th Avenue, in Los Angeles, were constructed using the pumice from these mines [Tr. 141]. Pumice was sold to important contractors such as Simpson Construction Co. and P. J. Walker in Los Angeles [Tr. 169]. The ceiling in the District Court room was made from acoustical pumice granules from the Brown Group of claims [Tr. 912]. He testified that there was still an active and going market for the pumice from subject claims in 1946, 1947, 1948 and still going on in 1964 [Tr. 175].

The evidence showed by the testimony of Appellee's witnesses Frederick and King that there was a substantial market for pumice within reasonable hauling distance long before and on the date of value and that aside from a let-down during the war years (which affected all building material industries) the demand renewed itself after the war, and prospect of growing demand was fairly indicated [Tr. 862-3]. The peak of the market in California was from March 20, 1945, to September 24, 1956 [Tr. 862-3].

Pumice production in California increased 50% in 1944 from 1943. It increased 100% in 1945, to 48,000 tons, to 81,000 tons in 1946, to 154,000 tons in 1947,

to 177,000 tons in 1948, and then up to 239,000 tons in 1951 [Tr. 1001-1003].

Appellee's witness King obtained from official State sources the selling prices of pumice products [Tr. 931] as well as from his own investigation and knowledge of market conditions [Tr. 831-835]. This witness had determined the cost of production of the various grades of pumice from both the Donna-Gill and Brown Groups of claims [Tr. 830-839].

Appellee's witness Frederick investigated the actual selling price of pumice in California from 1936 to 1964 and in addition the selling prices of pumice fom subject properties specifically from 1941 to 1963 [Tr. 993, 1036, 1038, 1040, 1051].

Appellee's witness Schmidt in forming his value opinion of Donna 3 and 4 and Ray Gill No. 31, uses actual cost figures from the company books, and actual published sales prices [Tr. 1249].

From a consideration of all of the factual data, namely; quantity of pumice in the mines, rate of production in California and in the subject area, cost of its production, processing and delivery to point of sale, sales prices of pumice at point of delivery and each of Appellee's witnesses formed and expressed their opinion of the value of each of the pumice claims. These were not arbitrary figures, but considered opinions from highly experienced mining engineers and geologists as to what a willing buyer and seller would be likely to pay on the open market for such claims at the date of value [Tr. 829, 909, 919, 1153, 1179].

Appellant contends that another District Court decision *United States v. Land In Dry Bed of Rosamond*

Lake, Calif., 143 F. Supp. 314, 322 (S.D. Cal. 1956) is controlling and relies on it strongly. Judge Carter's opinion is in disagreement with the Courts of Appeal in the Third, Fourth, Eighth and Tenth Circuits, as well as the District of Columbia. These cases are:

National Brick Company v. U.S., (D.C. 1942) 131 F. 2d 30 (involving sand);

Clark v. U.S., (CA. 8, 1946) 155 F. 2d 157 (involving lumber);

Cade v. U.S., (CA. 4, 1954) 213 F. 2d 138 (involving granite);

United States v. Silver Queen Mining Company, (CA. 10, 1960) 285 F. 2d 506 (copper and silver; and

United States v. Iriarte, et al., (CA. 3, 1948) 166 F. 2d 800, cert. denied, 335 U.S. 816 (land per square meter and lots).

The *Silver Queen Mining Company* case, *supra,* is particularly helpful to support Appellee's position herein: This case involved a condemnation of four patented mining claims. The United States Government already had exclusive surface rights for bombing, chemical research and so forth by the Air Force. The Appellee's witnesses, mining engineers, geologists and metalurgists expressed opinions that the lands were potentially valuable as mining properties although largely undeveloped and unproven. Surface showings and samples from a former shaft into one of the mines indicated an ore body containing silver, copper and a deposit of valuable calcium fluoride; that the claims were worthy of development and would in their opinion prove successful; and they would recommend the expenditure of develop-

ment money. They further testified that unproven claims as these were not sold outright for cash in the open market—but under a lease—option arrangement by owners and persons supplying development money wherein the owner was guaranteed a percentage of the ores produced and sold. When that percentage reached an agreed total, the properties became exclusively those of the developer. The witnesses expressed opinions that such a lease-option arrangement could be successfully negotiated for the subject property, and a total purchase price would be $200,000 payable entirely out of potential ore shipments. Various estimates of the cost of exploration and development were expressed up to $50,000.

The government experts testified to nil values as mines, that mineral showings were such as to negative existence of ore in commercial quantities and that development was not justified. Their total value was $2,000 or nominal. The government contended because of complete absence of expert opinion upon cash market value, and because of speculative nature of opinions of value, there was no probative evidence to determine just compensation.

The court held as follows:

> "As viewed from purely an academic and definition bound aspect, it would be naive to deny the merit of the government witnesses' argument. We believe, however, such approach to be too narrow under the circumstances of this case. In order to obtain substantial justice in eminent domain proceedings, it is necessary for the court to adopt working rules to fit the particulars of the case, *U.S. v. Miller, supra.* Such rules have recognized that

all properties do not have a readily proven market value and are not sold upon an open exchange and do not have a standard of comparison available to premise an opinion upon value. Although cash market value may not be proved with certainty, the test of just compensation remains the same, and required proof need rise no higher than the circumstances permit. Some speculation is inherent in the ascertainment of value of all resource property, be it mineral, oil, gas, if the quality of proof of value follows the custom of the industry, is the best available and is sufficient to allow the jury or court to make an informed estimate as to the fact of value, such proof is sufficient to meet the burden. Mr. Justice Brewer as early as 1890, speaking of the problem of ascertaining value for the condemnation of a mining claim, stated:

> '. . . the strip taken ran lengthwise through the claim, and upon the trial, witnesses were permitted to testify as to their opinion and judgment as to its value. It may be conceded that there is some element of uncertainty in this testimony, but it is the best of which, in the nature of things the case was susceptible. That this mining claim which may be called "only a prospect" had a value fairly denominated a market value may, as the Supreme Court of Montana well says, be affirmed from the fact that such properties are the constant subjects of barter and sale. Until there has been a full exploiting of the vein, its value is not certain, and there is an element of speculation, there must be conceded, in any estimate thereof. And yet uncertain and

> speculative as it is, such prospect has a market value, and the absence of certainty is not a matter of which the railroad company can take advantage when it seeks to enforce sale. *Montana Railway Company v. Warren,* et al., 137 U.S. 348, 352, 11 Supreme Court 96, 97, 34 L. Ed. 681.'
>
> Estimates and opinions were given as to the possible extent of the deposits, the cost of development and the ultimate reward for the owners if the mines should develop commercially. Admittedly, the quality of proof was such that the jury was faced with the necessity of conjecture; but we do not believe the verdict to be based upon pure speculation, but rather to be an informed finding based upon competent evidence reaching a standard dictated by the nature of the case."

The *Rosamond* case, *supra,* involved condemnation of fee title to a considerable amount of acreage of real property. The government witnesses testified to a highest and best use of said properties for desert homesites. The owners' experts testified that the highest and best use was to extract clay or mud which is used for rotary drilling of oil wells. No such products were ever produced from the subject properties. The owners' witnesses were not permitted to give opinions of fair market value of the mud or clay apart from the value of the land. The court held that experts or lay witnesses could describe the substance, the quantity thereof, the going prices as factors only, upon which an expert might in part base his estimate of the fair market value of the parcels of land in question. The court

ruled that the landowner must make some kind of showing of a market, poor or good, great or small for the commodity in question before the quantity and price of the commodity or substance may be presented to the jury to be used as a factor in the expert's opinion. The court agreed to permit the testimony of proposed cost per ton to remove the salt and sand from the clay (or to beneficiate it) subject to the condition that there be evidence of some market value good or bad, great or small, for the clay so produced and beneficiated. This case adds support to Judge Hall's decision in the instant case.

The discussion in the opinion by this Court of Appeals, in the case of *Phillips v. U.S.*, (C.A. 9, 1957) 243 F. 2d 1 set forth and discussed the type of proof which was competent, relevant and material where land under condemnation were alleged to contain oil and gas.

The case involved condemnation of a ranch. During trial, the owner-appellants, offered to prove by testimony and exhibits that there was an active oil leasing area and there was a value incident to mineral rights as a result. Offer was made of testimony of a geologist with the Shell Oil Company regarding the factors present necessary for exploration for oil and gas. Data as to all existing leases and a showing that almost all the land in and about the subject property to have been leased by major oil companies, was offered. Testimony was offered that oil and gas has been developed in the area for the past 14 years. At the date of the taking. there was an option for mineral rights and oil and gas lease was executed prior to the taking of the subject property and checks were written in advance of the taking against the rent and option for the oil lease. A

deed of the mineral rights had been prepared and offers of proof of such were made. Testimony was offered as to factors governing the decision to drill in the area by major oil companies, and this was to be corroborated by the geology departments of five major oil companies, plus Shell Oil Company. It was offered to prove that other sales nearby reserved oil and gas rights from the sales. The trial judge refused to permit the jury to consider any such evidence and instructed them to utterly disregard any mention of mineral rights.

This Court of Appeals held this to be in error and stated:

> "The element of speculation in mineral rights does not preclude their having an ascertainable market value. The Supreme Court answered this question, in the *Montana Railway Company v. Warren,* 1890, 137 U.S. 348, 352, 71 S. Ct. 96, 97, 34 L. Ed. 681 the court said:
>
> > 'There remains for consideration but a single point—that there was admitted in evidence on the trial the opinions of witnesses as to the value of the land, which were not based upon the sale of the same or similar property, and were therefore not the opinions of persons competent to testify. It appears that the land taken was a strip running through a mining claim, which had been patented and belonged to the defendants in error. The claim adjoined the Anaconda mining claim which had been developed and worked, and demonstrated to contain a vein of great value. The claim in controversy had been developed so far as to indicate that *possibly, perhaps probably,* the same rich vein extended

through its territory. It had not been developed so far that this could be offered as a fact proved. The strip taken ran lengthwise through this claim; and, upon the trial witnesses were permitted to testify as to their opinion and judgment of its value. It may be conceded that there is some element of uncertainty in this testimony, but it is the best of which, in the nature of things, the case was susceptible. That this mining claim, *which may be called only a prospect,* had a value fairly denominated a market value, may, as the Supreme Court of Montana well says, be affirmed from the fact that such prospects are the constant subject of barter and sale. Until there has been a full exploiting of the vein, its value is not certain and *there is an element of speculation, it must be conceded, in any estimate thereof. And yet, uncertain and speculative as it is,* such property *has a market value;* . . .'

In Eagle Lake Improvement Company v. United States, (C.A. 5, 1944) 141 F. 2d 562, 564, the following language was used:

'Appellants' principal contention is that the charge of the court erroneously stated the law applicable to the issue of mineral value and was misleading, contradictory and prejudicial. The instruction to which objection was made in substance charged that the jury should find the mineral interests valueless unless from the evidence it was believed that a reasonable probability existed that oil and gas in paying quantities might be produced. As held in *Olson v. U.S.,* 292

U.S. 246, 257, 54 Supreme Court 704, 78 L. Ed. 1236, elements affecting value that depend on occurrences which, though possible, are not reasonable, should be excluded from consideration, as too speculative and conjectural to afford a basis for the judicial ascertainment of values. In Texas, however, a mineral lease is recognized by law as being property having market value even if it covers undeveloped territory. Where oil interests are involved, a reasonable probability of successful dvelopment is sufficient to make leasehold estates of great value; indeed, where there is a reasonable possibility of production in paying quantities mineral rights are a common subject of barter and sale, and therefore have a definite and ascertainable market value, even where the prospects of successful development are too speculative and remote to be reasonably probable.'

In this circuit the matter has been put beyond cavil by our decision in *Cal-Bay Corporation v. U.S.* (C.A. 9, 1948) 169 Fed. 2d 15, 18, 19, cert. denied, 1948, 335 U.S. 859-860, 69 Supreme Court 134, 93 L. Ed. 406, in which the owners of mineral rights under lease for oil and gas development requested and instructed that, in the determination of value of oil and gas leases, it may be based on the reasonable possibility of production in paying quantities even though there were not a reasonable probability shown on such value. In that case, we quoted from the Eagle Lake case, supra, and we held:

We think the District Court errored in refusing the instruction. We take notice that in Califor-

> nia discovery in land of a reasonable probability of successful development are too speculative to be reasonably probable. The evidence, later quoted, shows there are hundreds of sales of lessor and lessee's rights in lands which sets speculative value. . . . The court foreclosed the appellant from making any proof as to either the possibility or probability of the existence of mineral deposits in their land. We think that such exclusion of evidence was error."

The *Georgia-Kaolin Company v. U.S.,* case, reported at 214 F. 2d 284, 286 (C.A. 5, 1954), cert. denied, 248 U.S. 914, is mentioned by Appellant in its brief in discussing the opinion of the District Court and the *Rosamond Lake* case, *supra.* In *Kaolin,* the ruling was merely that in the damage case before the court involving a breach of covenant in a lease which covenant provided for the return of the leased premises in good condition, the measure of damages in the case would be the difference in value between the leased land at the time of its leasing and its *value for all purposes* [emphasis added] at the time of its return to the lessor at the expiration of the lease. Contrary to the owner's theory of placing a separate value of the alleged kaolin deposits, the existence of kaolin is only one element that is to be considered with other elements and there cannot be a recovery of the value of the land and of the mineral rights as separate items.

This is the breadth of the holding of the case of *Mills v. U.S.,* 363 F. 2d 78 (C.A. 8, 1966) which case embraced testimony ignoring sales nearby, ignoring the expense significance of the depth of overlay varying from 80 to 230 feet, ignoring the costs of production

and of abandonments of coal mines nearby. The court stated that mere adaptability does not establish market value and the owner's value testimony was entirely speculative and simply a product of estimating reserves of coal and multiplying by 25 cents per ton.

In the case of *United States v. Whitehurst,* (C.A. 4, 1964) 337 F. 2d 765, also cited by Appellant (Appellant's Brief pp. 14, 22, 25, 26 and 28), here again the condemnation involved the taking of fee title, that is, the surface rights as well as the underlying interests. All of the area condemned had been used only for farming. A small pit was located in a portion of the remainder and had been excavated for sand and fill material for the very project which was involved in the taking and in the condemnation, namely, the Navy Air Station. The Court of Appeals reversed the judgment of the lower court which was based on findings of a Commission. The findings having been made in reliance on testimony of a witness who had never appraised a sand and fill deposit and had used a capitalization rate on nearly all of the soil and subsurface deposits an average depth over a 35 year period. The same witness relied mainly on the opinions of others and these opinions were in turn based on sales to the condemnor of fill material for the subject Navy Air Station (the record showing that all sales except to the Navy Base were merely nominal). The Commission had ignored all comparable sales, which were described in detail and five of which contained comparable de-

posits, but the sales prices nevertheless had reflected the values of farm land. The court disapproved of this "out of hand rejection of the comparable sales" by the Commission. The court further stated, however, at p. 776:

> "We do not hold that the use of capitalization of income to determine the value of a borrow bit should be rejected as inappropriate in every case. On the contrary, if all of the factors, which must necessarily be taken into account are established by the proper evidence, there would appear to be no valid reason to judicially condemn, prohibit or outlaw the use of this method."

In a 1965 case, the Court of Appeals for the 8th Circuit in *Hembree v. U.S.*, 347 F. 2d 108, was considering a condemnation case. The government witnesses contended that the highest and best use was for grazing purposes; whereas the owner's witnesses testified that it was for the quarrying of limestone for residential development. The court, after a preliminary hearing and considering a number of witnesses and exhibits, granted appellee's motion denying the submission of this factual issue to a jury as the evidence was insufficient. The evidence had shown that an eight foot stratum of limestone was under each parcel of land and such deposit contained carbonates which are useable in agriculture. Some previous quarrying had been done under a lease but had been discontinued and limestone had been extracted, processed and sold. Two expert witnesses testified to an existing and growing

market for such limestone. Records of former quarry operators showed royalties paid in the years 1955 to 1957 and the dollar amounts of such operating profit, without reserve for depreciation and taxes.

The court reversed the trial court's holding and stated that the limestone issue should have been submitted to the jury, stating:

> "We believe that *Cade v. U.S.,* supra, involving a deposit of granite rock; *U.S. v. Rayno,* supra, involving hardpan, and *National Brick Company v. U.S..,* 76 U.S. App. D.C. 329, 131 F.2d 30 (1942) are more apposite [than the cases relied upon by the government.]"

3. Appellant's Valuation Testimony Had No Probative Value, the District Court's Findings on Value Are Well Within the Valuations Testified to by Appellee's Witnesses and the Judgment Should Be Affirmed.

It is submitted that this record fully support Judge Hall's finding that the testimony of Appellant's witnesses had no probative value.

The court found as a matter of fact and law that American Pumice Company was entitled to the value of its interest in the claims Donna 3 and 4 and Ray-Gill No. 31 from the date it was excluded (May 29, 1945) as if there had been no revision of the boundaries, no amendment to the complaint and no order of dismissal. Testimony was introduced by Appellee's witnesses Frederick and King as to the value of the interest of Ameri-

can Pumice Company for the ten and one half year period of $938,000 and $600,000 respectively [Tr. 1074, 861]; by the witness Schmidt $700,000 [Tr. 1249]. The Court found that the economic life for said claims was a period of only five years and found the fair market value to be $110,000.

The total value of the Brown group of claims which the Court found were owned by American Pumice Company was $57,250.

The valuations established by the judgment for this group of claims are substantially below the testimony of Appellee's witnesses, to wit, King $310,000 [Tr. 837-838] and Frederick $251,000 [Tr. 1067, 1174-1175]. Schmidt did not testify as to the Brown group of claims.

The Court heard testimony that Schmidt, while employed by the government, had expressed an opinion in a report at about the date of taking by the government that there was $500,000 worth of pumice in Ray Gill No. 31. The court also heard testimony from the Appellant's witness Newby that while he was operating the subject claims for Desert Materials Company, he applied for a Reconstruction Finance Corporation loan and supported the application with a valuation report by F. Sommer Schmidt (Appellee's witness in the instant case) showing a market value of $751,852 with projected net profits of $137,808 per year for 10 years [Tr. 1834-1837].

Judge Hall was entitled to consider this testimony. It manifestly does not enhance appellant's protestations that profits were unobtainable.

For all of the foregoing reasons, it is submitted that the District Court has correctly ruled in the premises, and has not committed reversible error.

Conclusion.

The Judgment of the District Court should be affirmed.

Respectfully submitted,

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Dated: July 11, 1968

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

VICTOR R. HANSEN